No. 3865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. P. McDOWELL, doing business under the firm name and style of E. P. McDOWELL MOTOR COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

On the 31st day of January, 1921, plaintiff in error, hereinafter called the plaintiff, was the owner of a certain automobile, with its tools and accessories, which at the time were lawfully in possession of one A. J. Stuper under a valid contract of conditional sale.

Stuper was transporting in said automobile a quantity of whiskey, upon which the Internal Revenue Tax had not been paid. The sheriff of Big Horn County, Montana, seized said automobile and thereafter delivered it to the officers of the United

States of America, in whose possession it now is. Stuper was not convicted of the crime of transporting and removing distilled spirits, nor was he tried or convicted for transporting and removing the whiskey found in his automobile. Plaintiff had no knowledge that the automobile was being used to illegally transport liquor.

On the 31st day of August, 1921, the automobile was libelled by officers of the United States Government, and the plaintiff herein, through proper procedure, filed his motion to intervene, which was allowed. Thereafter a statement of facts was agreed to and signed by the interested parties, and the matter was submitted to the court for decision and thereafter a decree was made and entered condemning and forfeiting the automobile with its tools and accessories and directing that the same be sold at public auction (Transcript 25-26-27).

Thereafter, in due time, the bill of exceptions was duly filed, together with the assignment of errors.

Specifications of Error.

1. The court erred in overruling plaintiff in error's motion for judgment and decree in his favor, for the reason that the libel of information failed to state facts sufficient to show that the said automobile, tools and accessories, as alleged in the information, had been used in violation of any laws of the United States of America.

2. The court erred in refusing to grant plaintiff in error's motion for judgment and decree in his favor, for the reason that the libel of information was prosecuted by reason of the violation of the Internal Revenue laws of the United States of America and that said law or laws had been and were at the time of the trial of the said cause repealed by what is known as the National Prohibition Act, otherwise commonly known as the Volstead Act.

3. The court erred in refusing to grant the motion of plaintiff in error for judgment and decision in his favor, for the reason that he had a valid and existing claim against said automobile, tools and accessories and that he had no way of obtaining payment of said claim except by taking said automobile, tools and accessories.

4. The court erred in refusing to grant plaintiff in error's motion for judgment and decision in his favor and in rendering judgment and decision in favor of the libelant, for the reason that the statute under which the libel proceeded has been repealed, and the seizure and attempted forfeiture of the said automobile, tools and accessories was void, illegal and of no force and effect.

Arguments and Authorities.

In the agreed statement of facts (Transcript 21-22) it is expressly stipulated that the libel of

information as filed herein is prosecuted by reason of the violation of the Internal Revenue laws of the United States of America and not by reason of any violation of the National Prohibition Act. The portion of the Revenue laws under which the United States officers were acting is Section 3450 of the Revised Statutes which reads in part as follows:

> "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed * * * with intent to defraud the United States of such tax * * * all such goods and commodities * * * and vessel, boat, cart, carriage or any conveyance whatever * * * shall be forfeited."

The question which presents itself here is whether or not the National Prohibition Act repealed Section 3450 insofar as that section authorized the confiscation of vehicles used in transporting liquor upon which the tax had not been paid. If the section was repealed in that regard then any proceedings looking toward condemnation would have to be brought under the National Prohibition Act and the lower court was without power to confiscate the automobile in possession of Stuper.

The stipulation to the effect that this proceeding is under Section 3450 of the Revised Statutes and not under the National Prohibition Act relieves us from concern as to whether or not the automobile could be confiscated under the National Prohibition Act. We are interested only in the question of whether or not Section 3450 was impliedly repealed by the enactment of the National Prohibition Act.

Section 35 of that Act contains the following,

> "all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency."

The Supreme Court of the United States in the case of United States v. Yuginovich, (June 1, 1921), 256 U. S., page 450, 41 Sup. 551, decided that this provision of the Volstead Act must be construed in the light of the rule for construing Penal Statutes,

> "that later enactments repeal former ones, particularly covering the same acts, but fixing a lesser penalty."

Section 26 of the Volstead Act which authorizes the confiscation of vehicles used in the transportation of liquor visits a lesser penalty upon the owner of the vehicle than Section 3450 of the Revised Statutes. Under the latter section it makes no difference whether or not the owner of the vehicle is innocent. Even though his vehicle is used to transport liquor without his knowledge or consent it would be subject to confiscation. Under Section 26 of the Volstead Act the owner is permitted to show cause why the vehicle shall not be forfeited and there is a forfeiture to the extent only of the interests of those who were connected with the offense in some degree of responsibility, guilt, or negligence.

The question of whether or not the National Prohibition Act repealed Section 3450 of the Re-

vised Statutes has been before the District Courts of the United States a great many times within the last few months, but the decisions of those courts are in such hopeless conflict that no useful purpose will be served by analyzing them here. A large number of well-considered cases, as will appear from the list hereinafter set forth, hold that the effect of the enactment of the Volstead Act is to work a repeal of inconsistent provisions of the Revenue Acts.

The precise question here presented was before the Circuit Court of Appeals of the Fifth Circuit in the case of United States v. One Haynes Automobile, decided on July 25, 1921, and reported in 274 Fed. page 926. In that case a libel was brought to condemn an automobile under Section 3450 of the Revised Statutes, on the ground that it was at the time of seizure being used in the removal of liquor upon which the tax had not been paid. It was conceded that the libel did not allege facts sufficient to sustain it against demurrer as not stating a case for forfeiture under the Volstead Act although the acts complained of occurred since the Volstead Act took effect. In holding that the automobile could not be confiscated under Section 3450, Judge King said:

> "It is not, therefore, to be assumed that Congress intended to provide for the forfeiture of vehicles under Section 26 of the Volstead Act, with its provisions for preserving the rights of third persons, and still leave them subject to be forfeited under the *more drastic provisions* of Revised Statutes, Sec. 3450."

In Lewis v. United States, decided on April 14, 1922, by the Circuit Court of Appeals of the Sixth Circuit, and reported in 280 Federal, at page 5, the United States filed a libel against an automobile seeking to condemn it because it had been seized by the Collector of Internal Revenue while being used to transport whiskey upon which the tax had not been paid. The District Court entered its judgment of condemnation. The Circuit Court of Appeals reversed the District Court, saying in part:

> "The argument in favor of the implied repeal rests upon the principles adopted by the Supreme Court in U. S. v. Yuginovich, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed.—, and the controlling consideration is whether there is such inconsistency between a forfeiture of this automobile, under these circumstances, pursuant to Section 3450 and that forfeiture which is provided for under Section 26 of the National Prohibition Act, as to indicate that Congress did not intend a forfeiture under either section which the prosecutor might select.
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> The act now charged against Lewis was the transportation in his automobile of intoxicating liquor upon which no tax had been paid under the internal revenue law. Concededly this liquor had been manufactured for and was being concealed and transported for beverage purposes. The primary act, the removing and concealing, was the same when involved under one statute as under the other. The punishment provides under Section 3450, as it has been construed (Goldsmith v. U. S., 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed.—), was the confiscation of the automobile wholly without regard to the question whether the owner or lienholder was in any degree at fault; the pun-

ishment provided by the National Prohibition Act (Section 26) was a forfeiture of the machine to the extent only of the interests of those persons who were connected with the offense in some degree of responsibility, guilt or negligence.

* * * * * * *

We are not advised of any other supposed distinctions between the question now presented and that which has been decided by the Supreme Court, and our views concerning those which we have now considered make it necessary to hold that Section 3450 *is so far repealed that there cannot be a forfeiture thereunder* of the means used in transporting or concealing intoxicating liquor manufactured and intended for beverage purposes. However, this result would be sustained as well by the broader proposition that under the circumstances here existing, there could not have been the intent—necessary under Section 3450—to defraud the United States of the tax, and the validity of this broader proposition should be considered. The intent in that section specified is that to defraud of 'such tax', and this reference is to 'any tax' which 'is or shall be imposed' in respect of 'any goods or commodities'. By the system existing when section 3450 was adopted, it was contemplated that a specified tax was levied by the law upon all distilled spirits and that this tax must be paid by attaching to the container advance paid revenue stamps, with which it was the duty of every manufacturer to provide himself. This whole system, the automatic imposition of the tax and the advance of simultaneous payment therefor, was abolished by the new law. Stamps were expressly forbidden and—so far as we observe—no other method of payment was provided if the liquor was for beverage purposes.

"It is not easy to see how a duty to pay a tax can arise, if there is no way in which it

> can be paid and no officer authorized to receive it; nor how, *lacking any law which makes it a duty to pay, there can be an intent to defraud the law by not paying,* or by acts which would be in aid of an intent not to pay. The only tax which now is ever imposed against such liquor, and is also made payable, is that double tax which the collector specifically assesses in any case where evidence of an unlawful manufacture comes to his notice. The very provision that he shall assess a double tax may be said to imply that one-half of it is in place of that original tax which would have accrued under the old law, but which never had accrued under the new, and which therefore must be specifically levied. Of course, after such assessment, there could be an intent to defraud the United States out of such tax; but that case is not before us. Without doubt the power to tax illicit liquor, in spite of the absolute prohibition against manufacture, continues unimpaired; but the actual existence of any such tax until it is specifically assessed may well be thought to be inconsistent with the abolition of all existing methods of payment and the substitution of no other method."

The question of whether or not an automobile could be confiscated and libelled under the Internal Revenue laws was not raised in the case of United States v. Two Thousand Cases of Whiskey, et al, (Circuit Court of Appeals, Second Circuit), 277 Fed. Rep. 410, but the question of whether or not the National Prohibition Act repealed Revised Statutes 3453, providing for the seizure and forfeiture of goods, merchandise, etc., found in any person's possession or control, for the purpose of being sold or removed in fraud of the Internal Revenue laws,

was raised in that case and the court held that the National Prohibition Act repealed that section.

The reasoning in that case, we believe, should be applied to the facts in this case, the court saying: "We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes; but 'being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes,' it has erected its own machinery to accomplish the desired result."

The following cases hold that the National Prohibition Act has in some form or other repealed certain provisions of what is commonly known as the Internal Revenue Laws of 1866:

U. S. v. Windham (District Court) 264 Fed. Rep. 376;

U. S. v. Yuginni, et al (District Court) 266 Fed. Rep. 746;

U. S. v. Stafoff (District Court) 268 Fed. Rep. 417;

U. S. v. Puhac (District Court) 268 Fed. Rep. 392;

Reed v. Thurmond (Circuit Court of Appeals, 4th Circuit) 269 Fed. Rep. 252;

Ketchum v. U. S. (Circuit Court of Appeals, 8th Circuit) 270 Fed. Rep. 416;

Ravity v. Hamilton (District Court) 272 Fed. Rep. 721;

U. S. v. Dowling (District Court) 278 Fed. Rep. 630;

U. S. v. Yuginovich, 41 Sup Ct. Rep. 551,

We also desire to call the court's attention to the case of Farley v. United States, 269 Fed. 721, decided by this Honorable court on February 7, 1921, in which the court used the following language:

> "As we have seen, the Prohibition Act, by the third section of title 2, inhibits in the most comprehensive terms possible the manufacture of or traffic in intoxicating liquors except as authorized by the act, and an infraction of its mandate in this respect is rendered criminal by Section 29. So that here we find the entire subject-matter of criminal liability for such manufacture or traffic in intoxicants covered by the later statute, and with different penalties subjoined from those obtaining under the old statutes.
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> "We are of the opinion that the statute under which the indictment in the present case is preferred was repealed by implication by the Prohibition Act. As applicable to the present act, this view is sustained by two cases in the District Courts, United States v. Yuginni, et al, 266 Fed. 746, and United States v. Windham, 264 Fed. 376."

From the foregoing it is clear that the concensus of opinion of the Circuit Courts of Appeals is that the provision in Section 3450 for forfeiture of vehicles used to transport liquor upon which the tax has not been paid has been repealed by the National Prohibition Act and we therefore urge that the judgment of the lower court be reversed.

Dated, October 4, 1922.

Respectfully submitted,

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CHARLES A. STRONG,